

IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA.

CWP No.526/2006

Reserved on.20.6.2007

Decided on.20.7.2007

**H.P. State Cooperative Marketing and Consumers Federation Ltd.
...Petitioner.**

Versus

State of H.P. & others.

...Respondents

Coram

The Hon'ble Mr. Rajiv Sharma, J.

Whether approved for reporting ?¹. Yes.

For the petitioner : Mr. K.D. Sood, Advocate

**For the respondents Mr. M.S. Chandel, Advocate General with Mr. M.A. Khan and
Ms. Meenakashi Sharma, Dy AGs for respondents No.1 and 2.**

Mr. Shrawan Dogra, Advocate for respondent No.3.

Rajiv Sharma, J.

The brief facts necessary for the adjudication of this petition are that the respondent No.3 was served with a charge-sheet vide memorandum dated 18th January, 1993 and a supplementary charge-sheet was served upon him in the month of April, 1994. The Inquiry Officer after conducting the inquiry submitted a report to the Managing Director of the petitioner federation. The Inquiry Officer had held that charge No.1 was not proved beyond reasonable doubt and charge No.2 (i) and 2(ii) was held to be not proved and charge No.3 was also not proved beyond reasonable doubt. The Managing Director of the petitioner federation agreed with the findings recorded by the Inquiry Officer in

¹ *Whether the reporters of Local Papers may be allowed to see the judgment? yes.*

respect of charges No. 3 and 4 but he concluded that so far as charges No.1 and 2 are concerned, the same stood proved and he did not agree with the findings of the Inquiry Officer. The respondent No.3 was given opportunity of making a representation against the proposed penalty of withholding of three annual increments with cumulative effect by the Managing Director of the petitioner federation. He submitted his representation against the proposed penalty and was also given personal hearing. Ultimately the Managing Director had imposed penalty of withholding of two annual increments with cumulative effect vide office order dated 22.4.1996. He preferred an appeal to the Board of Directors which was dismissed on 11.9.1996 vide Annexure P-8. He filed a petition under section 72 of the H.P. Cooperative Societies Act, 1968 and the petitioner federation filed reply to the same. The Additional Registrar (Marketing) Cooperative Societies who entertained the application by treating the same as appeal/review against the order of the Managing Director HIMFED dated 22.4.1996 rejected the contention of respondent No.3 vide order dated 29.4.1999. He filed an appeal under section 93 of the H.P. Cooperative Societies Act, 1968 before the Additional Secretary (Cooperation) to the Government of Himachal Pradesh. The appeal was treated as review/revision for setting aside the order of Additional Registrar (Marketing) dated 29.4.1999. The Additional Secretary Cooperation vide his judgment dated 10.4.2003 allowed the petition and the order of the petitioner federation for imposition of penalty was set aside. The petitioner federation filed a review petition against the order dated 10.4.2003 but the same was rejected by the Additional Secretary (Cooperation) to the Government of Himachal Pradesh vide order dated 12.9.2005.

Mr. K.D. Sood, Advocate had strenuously argued that the orders passed by the Additional Secretary (Cooperation) to the Government of Himachal Pradesh dated 10.4.2003 is without jurisdiction.

Mr. Shrawan Dogra, Advocate appearing on behalf of the respondent No.3 had supported the order dated 10.4.2003 as well as order dated 12.9.2005.

I have heard the learned counsel for the parties and perused the record.

The position which emerges from the above mentioned facts is that the Inquiry Officer had held that none of the charges were proved against the delinquent. The Managing Director of the petitioner federation had come to the conclusion that charges No. 1 and 2 stood proved against the respondent No.3. The respondent No.3 was not heard by the Managing Director before disagreeing with the findings of the Inquiry Officer. The memorandum was issued to the respondent No.3 on 18th October, 1995 whereby an opportunity of making representation to the proposed penalty of withholding of three annual increments with cumulative effect was granted. It is settled law that when the disciplinary authority disagrees with the findings recorded by the Inquiry Officer, the delinquent has to be heard.

This Court is of the opinion that the Managing Director before recording disagreement with the inquiry report was required to issue a notice to respondent No.3 and after hearing him, suitable action could have been taken.

A Division Bench of Madhya Pradesh High Court in **S.S. Koshal V. State Bank of India**, 1992 LAB. I.C. 2013 has held that wherein an employer takes assistance of an Enquiry Officer, on whose report he has

to base his verdict, the rule of natural justice demands that whatever adverse material exists including the report of the Enquiry Officer and the opinion of the disciplinary authority, containing his findings or reasons of his disagreement, should be duly disclosed to the delinquent and he is effectively heard before the final decision is taken, so that he gets full opportunity to meet such adverse material before he is made to suffer punishment.

In **Shri Ram V. Bank of Baroda and others**, 1994 (2) LLJ 116, A Division Bench of Allahabad High Court has held as under:

“It is undisputed that the enquiry officer found various charges relating to financial irregularities proved against the petitioner, but found the charge relating to possession of disproportionate assets not proved. On receipt of the said report and on a consideration of the materials on the enquiry file, the disciplinary authority found the said charge also to be proved. It is also undisputed that in arriving at his conclusion regarding this charge, the disciplinary authority neither gave any indication about his attitude, nor any notice or opportunity of hearing to petitioner in this regard. The conclusion of the disciplinary authority in this regard thus was arrived at behind the back of the petitioner and consequently in our opinion constituted a breach of principles of natural justice. The principles laid down by the Supreme Court in Narayan Mishra v. State of Orissa 1969 SLR 657 as well as by a Division Bench of this Court in (R.P. Srivastava v. State Bank of India) 1990 (8) L.C. D. 497, in this regard are fully applicable to this case, and the findings arrived at by the Disciplinary Authority behind the back of the petitioner, and the impugned order of dismissal and the resultant order of dismissal is vitiated and liable to be set aside.”

The Hon'ble Supreme Court in **Ram Kishan v. Union of India and others**, 1996 (1) LLJ- 982 has held as under:

“The next question is whether the show cause notice is valid in law. It is true, as rightly contended by the counsel for the appellant, that the show cause notice does not indicate the reasons on the basis of which the disciplinary authority proposed to disagree with the conclusions reached by the inquiry officer. The purpose of the show cause notice, in case of disagreement with the findings of the enquiry officer, is to enable the delinquent to show that the disciplinary authority is persuaded not to disagree with the conclusions reached by the inquiry officer for the reasons given in the inquiry report or he may offer additional reasons in support of the finding by the inquiry officer. In that situation, unless the disciplinary authority gives specific reasons in the show cause on the basis of which the findings of the inquiry officer in that behalf is based, it would be difficult for the delinquent to satisfactorily give reasons to persuade the disciplinary authority to agree with the conclusions reached by the inquiry officer. In the absence of any ground or reason in the show cause notice it amounts to an empty formality which would cause grave prejudice to the delinquent officer and would result in injustice to him. The mere fact that in the final order some reasons have been given to disagree with the conclusions reached by disciplinary authority cannot cure the defect. But, on the facts in this case, the only charge which was found to have been accepted is that the appellant had used abusive language on the superior authority. Since the disciplinary authority has said that it has agreed partly to that charge, the provisional conclusion reached by the disciplinary authority in that behalf even in the show cause notice, cannot be said to be vague. Therefore, we do not finding any justification to hold that the show cause notice is vitiated by an error of law, on the facts in this case.”

Similarly the Apex Court has held in **Punjab National and others Vs. Kunj Behari Misra and another**, LLJ 1998 (2) 809 that the disciplinary authority should give the delinquent officer an opportunity to

represent before it disagrees with inquiring authority and records its findings. Their Lordships have held as under:

“The result of the aforesaid discussion would be that the principles of natural justice have to be read into Regulation 7 (2). As a result thereof whenever the disciplinary authority disagrees with the inquiry authority on any article of charge then before it records its own findings on such charge, it must record its tentative reasons for such disagreement and give to the delinquent officer an opportunity to represent before it records its findings. The report of the inquiry officer containing its findings will have to be conveyed and the delinquent officer will have an opportunity to persuade the disciplinary authority to accept the favourable conclusion of the inquiry officer. The principles of natural justice, as we have already observed, require the authority, which has to take a final decision and can impose a penalty, to give an opportunity to the officer charged of misconduct to file a representation before the disciplinary authority records its findings on the charges framed against the officer.”

The Apex Court in **Yoginath D. Bagde Vs. State of Maharashtra and another**, (1999) 7 SCC 739 has held as under:

“Recently, a three Judge Bench of this Court in Punjab National Bank v. Kunj Behari Misra relying upon the earlier decisions of this Court in State of Assam v. Bimal Kumar Pandit, Institute of Chartered Accountants of India v. L.K. Ratna as also the Constitution bench decision in Managing Director, ECIL v. B. Karunakar and the decision in Ram Kishan v. Union of India has held that: (SCC p. para 17)

“It will not stand to reason that when the finding in favour of the delinquent officers is proposed to be overturned by the disciplinary authority then no opportunity should be granted. The first stage of the enquiry is not completed till the disciplinary authority has recorded its findings. The principles of natural justice would demand that the authority which proposes to decide against the delinquent officer must give him a hearing. When the enquiring officer holds the charges

to be proved, then that report has to be given to the delinquent officer who can make a representation before the disciplinary authority takes further action which may be prejudicial to the delinquent officer. When, like in the present case, the enquiry report is in favour of the delinquent officer but the disciplinary authority proposed to differ with such conclusion, then that authority which is deciding against the delinquent officer must give him an opportunity of being heard for otherwise he would be condemned unheard. In departmental proceedings, what is of ultimate importance is the finding of the disciplinary authority.”

The Court further observed as under: (SCC p. 96, para 18)

“When the enquiry is conducted by the enquiry officer, his report is not final or conclusive and the disciplinary proceedings do not stand concluded. The disciplinary authority stand concluded with the decision of the disciplinary authority. It is disciplinary authority which can impose the penalty and not the enquiry officer. Where the disciplinary authority itself holds an enquiry, an opportunity of hearing has to be granted by him. When the disciplinary authority differs with the view of the enquiry officer and proposes to come to a different conclusion, there is no reason as to why an opportunity of hearing should not be granted. It will be most unfair and iniquitous that where the charged officers succeed before the enquiry officer, they are deprived of representing to the disciplinary authority before that authority differs with the enquiry officer’s report and, while recording a finding of guilt, imposes punishment on the officer. In our opinion, in any such situation, the charged officer must have an opportunity to represent before the disciplinary authority before final findings on the charges are recorded and punishment imposed.”

The Court further held that the contrary view expressed by this Court in *State Bank of India v. S.S. Koshal* and *State of Rajasthan v. M.C. Saxena* was not correct.”

Similarly, the High Court of Madras in **Devakumar L.M.V V. G.M., Canara Bank and another**, 2001 (1) LLJ 358 has held that where disciplinary authority disagrees with the findings of the Inquiring Authority it is bound to give an opportunity to the delinquent.

A Division Bench of High Court of Andhra Pradesh in **K.S.S.N. Sarma Vs. State Bank of India and others**, 2002 (2) Labour Law Journal 482 has held as under:

“At the hearing of the appeal, the only question canvassed by the learned Counsel for the appellant Mr. Srinivas, is that inasmuch as the disciplinary authority differed from the conclusions arrived at by the inquiring authority in respect of charge No. 1 (c), the order of imposition of penalty is unsustainable since no opportunity of representation has been afforded to the charged employee before the conclusion of the disciplinary authority differing from the conclusion arrived at by the inquiring authority. Learned Counsel for the appellant placed reliance on the decision of the Supreme Court in Punjab National Bank and others v. Kunj Behari Misra (1998-II-LLJ-809 (SC) in support of this contention. In the said decision, after an analysis of the general principles and earlier authorities on this aspect of the matter, the Supreme Court declared the law to the effect that whenever the disciplinary authority disagrees with the enquiring authority on any article of charge then before it records its own findings on such charge, it must record its tentative reasons for such disagreement and give to the delinquent officer an opportunity to represent before it records its findings. The report of the Enquiry Officer containing its findings will have to be conveyed to the delinquent officer so as to enable him an opportunity to persuade the disciplinary authority to accept the favourable conclusion of the Enquiry Officer. This principle has been enunciated as an emanation of the principles of natural justice and held to be an integral part of procedural due process. Conformity with the said binding

principle of law would invalidate the finding in respect of Charge No.1 (c).

The respondent No.3 had filed a detailed reply to the memorandum dated 18.9.2005. It was incumbent upon the Managing Director to consider the reply filed by him, but it is evident from the reading of office order dated 22.4.1996 that the same has not been taken into consideration. A bald assertion has been made that the representation made by the respondent No.3 was considered. It was incumbent upon the Managing Director to discuss the reply filed by the respondent No.3 in detail in office order dated 22.4.1996. Similarly, the appellate order dated 11.9.1996 is not a speaking order. The appellate order should always be a speaking and reasoned since the same is to be judicially reviewed by the Courts. There has to be due application of mind by the appellate authority and it must ensure that the disciplinary proceedings are held in accordance with law and the procedure prescribed therein has been followed.

The Hon'ble Supreme Court has held in ***Narinder Mohan Arya versus United India Insurance Co. Ltd. And Others*** (2006) Vol. 4 SCC 713 that the order passed by the Appellate Authority should be reasoned order. Their Lordships has opined as under:-

“We may for the aforementioned purpose take note of the extant rules operating in the field. Requirements of consideration in an appeal from an order of the disciplinary authority by the Appellate Authority is contained in Rule 37 whereas the provisions as regards filing of a memorial are contained in Rule 40 thereof, which read as under:

“37. Consideration of appeals.-(1) In case of an appeal against an order of suspension, the Appellate Authority shall consider whether in the light of the provisions of Rule 20 and having regard to the circumstances of the case the order of suspension is justified or not and confirm or revoke the order accordingly.

(2) In the case of an appeal against an order imposing any of the penalties specified in Rule 23, the Appellate Authority shall consider:

(a) whether the procedure prescribed in these Rules has been complied with and if not, whether such non-compliance has resulted in failure of justice;

(b) whether the findings are justified; and

(c) whether the penalty imposed is excessive, adequate or inadequate, and pass orders:

I. setting aside, reducing, confirming or enhancing the penalty; or

II. remitting the case to the authority which imposed the penalty or to any other authority with such direction as it may deem fit in the circumstances of the case.

“40. Memorial. – An employee whose appeal under these Rules has been rejected by the Chairman/Chairman-cum-Managing Director or in whose case such Appellate Authority has enhanced the penalty either on appeal under Rule 24 or on review under Rule 39(2) may address a memorial to the Chairman/Chairman-cum-Managing Director in respect of that matter within a period of 6 months from the date the appellant

received a copy of the order of such Appellate Authority.

The Appellate Authority, therefore, while disposing of the appeal is required to apply his mind with regard to the factors enumerated in sub-rule (2) of Rule 37 of the Rules. The judgment of the civil court being inter partes was relevant. The conduct of the appellant as noticed by the civil court was also relevant. The fact that the respondent has accepted the said judgment and acted upon it would be a relevant fact. The authority considering the memorial could have justifiably come to a different conclusion having regard to the findings of the civil court. But, it did not apply its mind. It could have for one reason or the other refused to take the subsequent event into consideration, but as he had a discretion in the matter, he was bound to consider the said question. He was required to show that he applied his mind to the relevant facts. He could not have without expressing his mind simply ignored the same.

33. An appellate order if it is in agreement with that of the disciplinary authority may not be a speaking order but the authority passing the same must show that there had been proper application of mind on his part as regards the compliance with the requirements of law while exercising his jurisdiction under Rule 37 of the Rules.

The Additional Registrar (Marketing) Cooperative Societies had rejected the appeal of respondent No.3 on 29.4.1999. The appeal had been preferred by the respondent No.3 against the order dated 29.4.1999 on 18.11.2002. The same was decided by the Additional Secretary (Cooperation) on 10.4.2003. The Additional Secretary (Cooperation) had

condoned the delay on 22.2.2003. The petitioner federation had not assailed the order 22.2.2003. The Additional Secretary (Cooperation) had considered the issuance of Annexure P-13/1 dated 23rd November, 1991 issued under the provisions of the H.P. State Coop. Marketing and Consumers Federation Rules. The Additional Secretary (Cooperation) had come to the definite conclusion that the copy of the letter dated 23rd November, 1991 was never circulated to the employees of the Federation. The officials of the federation had admitted during the course of inquiry that the communication dated 23rd November, 1991 was not received in the federation. The Additional Secretary had come to the right conclusion that under rule 3.20 of the HP State Coop. Marketing and Consumers Federation Limited Service Rules do not prohibit the employees of the federation to contest the election of the Panchayat. The Additional Secretary (Cooperation) had minutely considered the evidence led by the parties with regard to charge No. II (i). It has come in the evidence that there was great rush to manage carton boxes during the month of August and it has been stated by the witnesses that the rectification note was put up and the mistake was rectified with regard to entry of Rs. 500/- made in place of Rs. 5000/-. As far as the charge No. II ((ii) is concerned, the Inquiry Officer after taking into consideration the statement of the PWs as well as on the basis of the statement of DWs had deposed that the shortage as calculated by Shri Jublani on his surprise checking of cash on 10.1.1994, the payment of Rs. 840/- and Rs. 168/- was paid on account of vehicle repair by Smt. Usha Sharma in the presence of Sh. Chhabi Lal, Peon and a cheque of Rs. 500/- has not been taken into consideration. This aspect has also gone into by the Additional Secretary (Cooperation) while passing the order. Consequently the order dated 10.4.2003 cannot be faulted with.

No foundation had been laid by the petitioner for seeking review of order dated 10.4.2003 before the Additional Secretary (Cooperation). Accordingly there is neither any jurisdictional error nor any procedural irregularity in the orders dated 10.4.2003 and 12.9.2005.

Consequently the writ petition is dismissed with no order as to costs.

(Rajiv Sharma), Judge

July 20, 2007

Awasthi